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JOHN T. FEY, CL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 600

J. M. HUBER CORP., *Petitioner,*

v.

FEDERAL POWER COMMISSION, *et al. Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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J. M. HUBER CORP., *Petitioner,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above entitled case on August 31, 1956.

OPINIONS BELOW

The opinion of the Court of Appeals (App. 4a)[1] is reported in 236 F. 2d 550. The order of the Federal

[1] References to "App. ...." are to the printed appendices attached at the end of this petition.

Power Commission (R. 29a)[2] is not as yet reported. The decision of the Presiding Examiner (R. 6a) is not as yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on August 31, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

Did the court below err in extending the decision of this Court in the *Phillips* case[3] (holding that despite the production and gathering exemption set forth in Section 1(b) of the Natural Gas Act, the Federal Power Commission had jurisdiction under Section 4 of that Act over the *rates* at which independent producers could sell natural gas in interstate commerce for resale) to the wholly different legal and factual situation presented by this case, where the issue is whether the Commission has jurisdiction, under Section 7(b) of that Act, over an independent producer's abandonment of production or gathering facilities and services relating to a sale in interstate commerce?

Should not this case, instead of being decided on the basis of an improper extension of the *Phillips* decision, be governed by the rationale of this Court's decision in the *Panhandle* case[4] (holding that Section 1(b) removed production and gathering facilities from

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[2] References to "R. ...." are to the printed appendix to petitioner's brief in the Court below, which is part of the record certified to this Court.

[3] *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672 (1954).

[4] *F.P.C.* v. *Panhandle Eastern Pipeline Co.*, 337 U.S. 498 (1949).

the Commission's jurisdiction over abandonment under Section 7(b))?

Are an independent producer's production and gathering facilities, which are otherwise exempt from Commission jurisdiction by Section 1(b) of the Natural Gas Act, rendered subject to the Commission's jurisdiction over abandonment under Section 7(b) of that Act because those facilities also are used in or useful to a sale of natural gas in interstate commerce?

Can the Commission issue a certificate of public convenience and necessity, pursuant to Sections 7(c) and 7(e) of the Natural Gas Act, to an independent producer who is unwilling to render the service involved, and compel that independent producer to accept the certificate and to continue to render the service which the producer has sought to terminate?

STATEMENT OF THE CASE

This case involves a basic issue permeating a substantial area of Federal Power Commission[5] regulation of independent producers and gatherers under the Natural Gas Act, as amended,[6] which has not heretofore been decided by this Court. This Court's decision in *Phillips Petroleum Co.* v. *Wisconsin,* 347 U. S. 672 (1954) resolved the fundamental issues pertaining to the interrelation of the production and gathering exemption of Section 1(b) of the Act (Title 15, U.S.C., Section 717(b), 52 Stat. 821) and the Commission's *rate* jurisdiction, as set forth in Section 4 of the Act, (Title 15, U.S.C., Section 717c, 52 Stat. 882). This case presents the wholly different and equally impor-

[5] Hereinafter referred to as the "Commission".

[6] Hereinafter referred to as the "Act". The pertinent provisions are set forth in Appendix A to this petition.

tant question of the interrelation of the producing and gathering exemption and the Commission's jurisdiction over *certification and abandonment of facilities and services*, as set forth in Section 7 of the Act (Title 15, U.S.C., Section 717f, 52 Stat. 824, 56 Stat. 83).

The proceedings in the Court below were pursuant to Section 19(b) of the Act, (Title 15, U.S.C., Section 717r(b), 52 Stat. 831), to review an order of the Commission. This order required the petitioner, J. M. Huber Corporation,[7] an independent producer of natural gas, to continue to sell natural gas produced from eleven wells in the West Panhandle field of Texas, of which Huber is the lessee, to the Northern Natural Gas Company,[8] an interstate pipeline company. Huber also was required to accept a certificate of public convenience and necessity covering this sale. This controversy concerns the power of the Commission to compel such action where Huber desires to abandon the deliveries of gas to Northern, has asserted its private contractual right vis-a-vis Northern to terminate deliveries, and has notified the Commission of its unwillingness to continue the service or to accept a certificate of convenience and necessity therefor.

Petitioner's basic position is that the Commission has no jurisdiction over the abandonment of its deliveries to Northern. Observing that the Commission's jurisdiction over abandonments of service is specifically restricted to services rendered by means of facilities subject to its jurisdiction (Section 7(b), Title 15, U.S.C. Sec. 717 f(b), (52 Stat. 824), Huber contends that its facilities utilized in connection with the sale

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[7] Hereinafter referred to as "Huber".

[8] Hereinafter referred to as "Northern".

to Northern are "production" or "gathering" facilities, exempt from the Commission's jurisdiction by Section 1(b) of the Act. Petitioner argued that the principles enunciated in the decision of this Court in *F.P.C.* v. *Panhandle Eastern Pipeline Co.*, 337 U.S. 498 (1949), which held that the producing and gathering exemption of Section 1(b) removed certain gas leaseholds from Commission jurisdiction under Section 7(b), are equally applicable to the facilities here in question.

Huber further contends that the Commission cannot issue to Huber, which is neither "willing" nor an "applicant" within the meaning of Sections 7(c) and 7(e) of the Act, (Title 15, U.S.C., Sections 717(c), 717f(e), 52 Stat. 824, 56 Stat. 83), a certificate of convenience and necessity, and that, since the sale to Northern is unlawful in the absence of certification by the Commission, Huber must be permitted to terminate the sale.

Both the Commission and the court below rejected petitioner's contentions as outlined above. Instead of applying the rationale of the *Panhandle* case, *supra*, to fix the ambit of jurisdictional abandonments under Section 7(b), they chose to extend the doctrine of *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672 (1954) from rate regulation under Section 4 to abandonment of facilities and services under Section 7(b). In substance both the Commission and Court below ruled that wherever a sale of natural gas could be regulated as to rates, all facilities used or useful in effecting deliveries of that gas were subject to Commission jurisdiction without regard to whether they were "producing" or "gathering" facilities within the meaning of the exemption in Section 1(b). They

coined a new and sweeping concept of "sales facilities" as a basis for jurisdiction which overrides and ignores the producing and gathering exemption. (App. 11a; R. 17a-19a).

In the absence of an overruling or reconsideration by this Court of its decision in the *Phillips* case, Huber does not challenge the conclusion that under the *Phillips* decision the sale to Northern is a sale in interstate commerce for resale which is subject to the Commission's rate jurisdiction and makes Huber a "natural gas company" if the sale is continued. These were the issues in the *Phillips* case. Even though the facts of the present case are different, in that Phillips processed as well as produced and gathered the gas, Huber does not seek to litigate whether any *rates* it might charge are within the ambit of the *Phillips* decision. What Huber does challenge is the extension of jurisdiction over rates in sales in interstate commerce to jurisdiction over the abandonment of that service when rendered by "producing" or "gathering" facilities.

The background, facts, and procedural history of this controversy are as follows:

Pursuant to a contract dated April 21, 1936, with Northern, Huber sold certain natural gas to Northern which it produced and gathered from 11 wells, insofar as here pertinent, in the West Panhandle field of Texas, and Northern ultimately transmitted and sold that gas in interstate commerce (R. 9a-13a).

Until June 7, 1954, the date of the *Phillips* decision, *supra*, there was no federal regulation of this sale because the Commission had taken the position that such sales were exempt from the Commission's jurisdiction

under Section 1(b) of the Act, which exempted "the production or gathering of natural gas" from the Commission's jurisdiction. Shortly after the *Phillips* decision the Commission issued a series of regulations purporting to govern the rate, certification, abandonment, and other aspects of all sales such as the one here in issue, and in substance purported to freeze such sales as they were on June 7, 1954, unless Commission approval for any change first was obtained (R. 159a).[9]

The Commission regulations had a direct impact on certain aspects of the Huber-Northern contract, which led Huber to believe that it had the right under the contract to terminate the contract. Accordingly, on September 1, 1954, Huber gave Northern the 180-day notice of termination required by the contract (R. 147a-149a).[10]

On September 24, 1954, Huber, as required by the Commission's regulations, filed with the Commission

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[9] Order 174-A was issued on August 6, 1954. Order 174-B, revising Order 174-A, was issued on December 17, 1954. See 19 Federal Register 4535, July 22, 1954; 19 Federal Register 5081, August 12, 1954; 19 Federal Register 6301, September 30, 1954; 19 Federal Register 8809, December 23, 1954; Title 18, Code of Federal Regulations, Sections 154.91-154.102; Sections 157.23-157.29.

[10] The question of the contractual rights of Huber vis-a-vis Northern is not in issue in these proceedings, since, of course, the jurisdiction of the Commission cannot depend on whether or not Huber had a right to terminate the contract, but depends solely upon the terms of the Act. Accordingly, while both the Commission and the Court of Appeals for the Third Circuit commented on these contractual relations, it is respectfully submitted that the comments have no bearing on these proceedings, but that, in the event that this Court determines that the Commission does not have jurisdiction, these issues will be determined either in negotiations or private litigation between Huber and Northern.

(under protest) an application for a certificate of public convenience and necessity covering the sale to Northern, a rate schedule, consisting of its contract, as amended, with Northern, and its notice to Northern of the cancellation of the contract, which the Commission treated as an application to abandon. Northern was permitted to intervene in these proceedings and filed a complaint opposing the cessation of the service. While these proceedings were pending, Huber was enjoined from terminating its sale to Northern pending final Commission determination. *F. P. C.* v. *J. M. Huber Corp.*, 133 F. Supp. 479 (D.N.J., 1955).

The facts developed in the proceedings before the Commission are undisputed. Huber produces and gathers gas from the 11 wells, utilizing an 8-mile gathering system consisting of a pipeline in the form of an arc, with lateral lines to the wells. At a central point in this gathering line there are three valves connected together in the shape of a "T". These valves, like other valves throughout the gathering system, control the flow of the gas. The two valves at the ends of the crossbar of the "T" control the flow of gas from the gathering lines to the north and south respectively. The stem of the "T" consists of two feet of pipe and a valve, into which a Northern pipeline connects, which controls the flow of gas from the entire gathering system. Northern receives the Huber gas at the end of the stem of the "T", measures it, commingles it with gas gathered from several other producers, pipes it through a compressor station near the Huber facilities, then over a number of miles of pipe to a second compressor station, the Skellytown station, where it is commingled with other gas gathered by Northern, all this within the state of Texas. From the

Skellytown station the gas is piped by Northern into interstate commerce (R. 10a-11a).

Huber's production activities on the wells whose output is purchased by Northern are extensively regulated by the Texas Railroad Commission, including regulation of the amount permitted to be produced and delivered each month and annually (R. 62a-69a).

All of the facilities owned and operated by Huber in connection with the sale of gas to Northern, from the well to the point where Huber's and Northern's facilities connect, including those facilities at the point of connection, are classified in the industry from a functional or engineering point of view, as "production" or "gathering" facilities and so denominated. All of Northern's facilities, from this point of connection with Huber's facilities, up to the second or Skellytown compressor station, likewise are known in the industry as "gathering" facilities (R. 62a, 69a, 115a, 116a).[11]

The Commission, in adopting the decision of the Presiding Examiner as its own (R. 29a-30a), concluded, upon this record, that—out of many miles of pipe line and other facilities owned and operated by Huber and producing and gathering gas from the 11 wells—the 3 valves and 2 feet of pipe, located at the point where the Huber and Northern facilities connect, are necessary and useful to the sale to Northern, and therefore subject to the Commission's jurisdiction

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[11] It also appears that Northern's facilities, up to the Skellytown compression station, never have been certificated by the Commission (R. 108a-109a, cf. R. 22a), and the Commission, in other proceedings, appears to have held that such facilities are gathering facilities exempt from Commission jurisdiction. *Matter of Northern Natural Gas Co.* (Opinion No. 230, 1952) (not yet reported).

(R. 17a-19a). Based on its asserted jurisdiction over the 3 valves and 2 feet of pipe, the Commission concluded it had jurisdiction under Section 7(b) over the abandonment of the sale to Northern which Huber had attempted to carry out. (R. 20a). The Commission refused permission to Huber to terminate the sale (R. 24a-26a).

The Commission also issued a certificate of convenience and necessity to Huber covering the sale to Northern. It made no finding that Huber was "willing" to perform the service, as required by Section 7(e), since the record was clear that Huber was unwilling. On the contrary, it concluded that such a finding was unnecessary because Section 7(c) of the Act permitted issuance of such certificates with respect to services in existence on February 7, 1942, without a finding of willingness (R. 15a-16a). The Commission made no reference to the fact that such Section 7(c) certificates are restricted to persons who applied for such certificates within ninety days of February 7, 1942, which Huber did not do (R. 32a-35a).

The Court of Appeals affirmed the Commission's decision, primarily on the ground that, as a matter of law, the *Phillips* decision made the 3 valves and 2 feet of pipe "sales facilities" subject to Commission jurisdiction over abandonment (App. 11a). The Court also held that a certificate could be issued to Huber under Section 7(c), despite the ninety day limitation (App. 9a-11a).

REASONS FOR GRANTING THE WRIT

When the Court, in its 5 to 3 decision in *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 671 (1954), held that the Commission had jurisdiction to regulate the

rates at which independent producers sold gas in interstate commerce for resale, the question immediately arose as to the scope of that regulation by the Commission. The Commission, as noted above, took the *Phillips* decision as a broad charter of authority, and issued omnibus regulations relating not only to rates, but also to other matters, not referred to in the *Phillips* decision, such as abandonment and certification of facilities and services. These regulations, as a practical matter, placed the entire operations of the independent producers under detailed administrative supervision by the Federal Power Commission in addition to the pre-existing regulation by state commissions such as the Texas Railroad Commission.

This resulted, and is resulting, in a multiplicity of litigation in the Commission and the courts concerning the scope of the regulations, and their applicability to specific activities of the independent producers. This case presents important questions which are present, directly, or indirectly, in a large number of these proceedings, and which have not been resolved by this Court.

The Court below and the Commission have chosen to interpret the *Phillips* decision as, in effect, restricting the decision in *F.P.C.* v. *Panhandle Eastern Pipeline Co.*, 337 U.S. 498 (1949), to its facts, and as permitting Commission regulation of production and gathering facilities when used in connection with a sale. The scope of Commission regulation of independent producers turns on the propriety of that interpretation. In this context, there are a number of compelling reasons for granting a writ of certiorari in this case.

A. THE QUESTIONS PRESENTED ARE OF MAJOR SIGNIFICANCE IN THAT THE ENTIRE PATTERN OF EXPLORATION, PRODUCTION, GATHERING, AND SALE OF NATURAL GAS, BY "INDEPENDENT PRODUCERS", IS SUBSTANTIALLY AFFECTED BY THE DETERMINATION OF WHETHER THOSE "INDEPENDENT PRODUCERS" MAY TERMINATE SALES OF GAS IN INTERSTATE COMMERCE WITHOUT APPROVAL OF THE COMMISSION.

The natural gas industry is the sixth largest industry in the country measured in terms of capital expenditures and is now believed to be the largest supplier of home fuel, as well as a major supplier of fuel for industrial uses. A major portion of the gas sold in interstate commerce is purchased by the companies operating interstate pipe-lines from independent producers and gatherers. A final determination by this Court of the question of the right of "independent producers" under the Act to abandon an interstate sale is indispensable to the sound development of new gas resources. It is also necessary to their uninhibited commitment of such gas to the interstate market, as well as to the orderly execution and regulation of existing commitments.

A producer of gas may wish to commit gas to a particular sale in interstate commerce for less than the life of the gas field for any number of reasons. He may anticipate need of the gas himself in a few years in some industrial operation.[12] He may anticipate the need of this gas in a few years in some long range venture in the marketing of gas involving the development of other producing wells. He may not have his own gathering or processing facilities immediately available but intend to construct them in the near future. He may

[12] Huber, for example, has a carbon black plant in the vicinity of the gas field here involved and anticipates the need of additional gas for that plant in view of its current expansion. (R. 24a).

simply anticipate a better market for the gas in a few years. If, as is commonly the case, he leases the field, he may have certain obligations to the lessors with respect to disposal of the gas or development of the field. In each of these instances, he may wish to sell the gas which the well may produce immediately, so that he does not lose his current share of the monthly allowables set by the state regulatory commission, and in order to have the income which immediate production would provide.

In this context, the producer should know certain things before he decides when to undertake the exploration of a field, before he drills the well, before he makes any long-range industrial or commercial plans or commitments, and certainly before he commits the gas to interstate commerce. He should know whether he has the right to provide in the contract that the sale may terminate in a given period of time, or under certain specified circumstances. Certainly he should know whether, once he has agreed to sell the gas for transportation in interstate commerce, the Commission has an absolute veto over any termination of the sale and the power to order continuing deliveries until the supply is exhausted.

Similarly, the purchaser of the gas must be able to rely with certainty on this same type of information. The purchaser may seek certain markets, construct different type facilities, make certain types of contracts, or make or not make other commitments with respect to other purchases, depending on the answer.

The Commission also should know the answer to this question in order to effectively carry out its statutory mandate. In approving expansions of service by

pipeline companies it is important for the Commission to know with certainty whether the gas supply relied upon is firm because of the claimed Commission jurisdiction over abandonment, or whether the Commission must take other action to insure continuity of supply. For example, the Commission could require that pipeline companies secure non-terminable contracts for the life of the field as a prerequisite to expanding their services.

The Commission itself has taken the position outside this litigation that jurisdiction over independent producers is neither necessary nor desirable in order to effectively protect the interests of the consuming public.[13] Surely, however, whether it has that jurisdiction or not, it is least effective when the jurisdictional questions are contained in an aura of uncertainty. Under such circumstances, the Commission cannot make the necessary plans for seeking the increased funds and staff necessary to regulate properly the many thousands of independent producers. Neither can it assign its limited staff to resolving such difficult problems as the appropriate basis for measuring the reasonableness of rates charged by independent producers — a matter wholly unresolved although more than two years have elapsed since the *Phillips* decision.

Until this Court has ruled on the basic question presented in these proceedings the many independent producers and gatherers, such as petitioner, and the numerous companies who purchase gas from them, will be unable to take the steps necessary for the

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[13] See Hearings on H.R. 4560, House Committee on Interstate and Foreign Commerce, 84th Cong., 1st Sess., pp. 11-12 (1955).

orderly development of their businesses, and the channeling and commitment of natural gas into interstate commerce. The Commission itself will be unable to do an effective job of regulation. The natural tendency of producers will be to hold off exploration, or divert known supplies of gas from the regulated interstate market for the indefinite future or, at least, until these issues are resolved. It is patent that the interests of the millions of users of natural gas also will be prejudiced by continuing uncertainty.

B. THERE ALREADY IS A MULTIPLICITY OF LITIGATION INVOLVING COMMISSION JURISDICTION OVER ABANDONMENT OF PRODUCING AND GATHERING FACILITIES AND CLOSELY RELATED QUESTIONS, WHICH LITIGATION WILL INCREASE IN THE ABSENCE OF FINAL DETERMINATION OF THESE QUESTIONS BY THIS COURT, BUT WHICH LITIGATION LARGELY CAN BE SET AT REST BY REVIEW OF THIS CASE.

The decision of this Court in *Phillips Petroleum Co.* v. *Wisconsin,* 347 U.S. 671, raised at least as many questions as it answered. In speaking of a multiplicity of litigation, however, petitioner is not speaking of the multiplicity of litigation relating to questions under Section 4 of the Act, such as whether the rates of a particular producer or gatherer in a particular sale in interstate commerce are within the ambit of the *Phillips* decision.

The multiplicity of litigation to which petitioner is addressing itself consists of the numerous pending (and some decided) cases in which questions have been raised under Section 7(b), 7(c), and 7(e) of the Act. These cases consider the jurisdiction of the Commission over a proposed termination of a sale of natural gas in interstate commerce for resale by an independent producer or gatherer who alleges that he does not have facilities subject to Commission jurisdiction.

Also referred to are the cases in which questions have been raised under Section 7(c) and 7(e) of the Act, as to whether the Commission can certificate certain facilities and services of an independent producer and gatherer, where it is alleged that certification is improper because the facilities involved are production or gathering facilities.

In the Court of Appeals for the Fifth Circuit, a number of cases presented these questions in the form of petitions to review the general regulations of the Commission concerning independent producers and gatherers which were promulgated after the *Phillips* decision. The merits of these questions have not been passed upon by the Court on the ground that in the form presented, they were not judicially reviewable at that time. Judge Brown, dissenting, thought the cases were ripe for review, and indicated considerable "doubt concerning the right to forbid or regulate abandonment of sales since the Act relates expressly to service by jurisdictional facilities." *Magnolia Petroleum Co., et al.* v. *F.P.C.*, 236 F. 2d 785, 806 (C.A. 5, 1956); see also *The Texas Co.* v. *F.P.C.*, 236 F. 2d 813 (C.A. 5, 1956); *Gulf Oil Corp. et al* v. *F.P.C.*, 236 F. 2d 812 (C.A. 5, 1956); *Union Oil Company of California* v. *F.P.C.*, 236 F. 2d 816 (C.A. 5, 1956); *Shank* v. *F.P.C.*, 236 F. 2d 830 (C.A. 5, 1956); *Lee* v. *F.P.C.*, 236 F. 2d 835 (C.A. 5, 1956).

There are presently pending before the Court of Appeals for the Fifth Circuit two other cases which directly present the question of the Commission's jurisdiction under Section 7(b), over termination of a sale by independent producers and gatherers. *Magnolia Petroleum Co. et al* v. *F.P.C.*, # 16,092; *Sun Oil Co.* v. *F.P.C.*, # 16,094. For the Commission's de-

cision, see *Matter of Argo Oil Corp. et al.,* 15 F.P.C. 601, 622 (1956).

The question of Commission jurisdiction under Section 7(b) also has been raised in several decided cases before the Commission. *Matter of Skelly Oil Co. and Lone Star Gas Co.* v. *Skelly Oil and Oklahoma Natural Gas Co.,* 15 F.P.C. 1123 (1956); *Matter of Dixie Pipe Line Co. et al,* Opinion No. 285, issued September 9, 1955 (not yet reported), (the *Dixie Pipe Line* case alone involved 19 independent producers).

There also have been approximately 5,000 proceedings before the Commission, where a certificate of convenience and necessity has been granted to an independent producer and gatherer, in which the question has arisen as to which facilities were required to be certificated under Section 7(c) of the Act and which facilities are exempt from Commission jurisdiction because of the producing and gathering exemption contained in Section 1(b) of the Act. In these cases, the question of abandonment jurisdiction under Section 7(b) is indirectly presented. To the extent that there are no facilities within the Commission's jurisdiction, and thus no facilities to be certificated under Section 7(e), the Commission would have no jurisdiction over abandonment if the plain language of Section 7(b) is given effect. Until recently, the Commission has avoided this issue by not specifying which facilities it was certificating, but merely stating that it was certificating all facilities within its jurisdiction. In almost all of these approximately 5,000 instances, Commissioner Digby has stated, in a concurring opinion, as follows:

> "The issue to be resolved is whether the Natural Gas Act requires that a certificate of public convenience and necessity issue for construction

> and operation of the facilities necessary to effect a sale by a producer or gatherer in interstate commerce for resale. The issue is not whether a sale of gas in interstate commerce for resale can be made without facilities. It cannot be doubted that facilities necessary to effect a sale of natural gas in interstate commerce are facilities used in interstate commerce. Recognition of this fact cannot, however, create power in this Commission to issue, much less to require certificates authorizing construction and operation of such facilities."[14]

Undoubtedly this opinion will be filed in the additional thousands of certification proceedings now pending or likely to arise in the next few years.

In a recently decided case, the Commission did attempt to delineate which facilities of an independent producer required certification under Section 7(c) of the Act. It held, in substance, that regardless of whether such facilities were producing or gathering facilities, certification was required if the facilities also "serve the function of effecting the interstate sale or interstate transportation as the case may be." *Matter of Continental Oil Co.*, Opinion No. 293, issued September 20, 1956 (not yet reported). This opinion relied heavily on the decision of the Court of Appeals in the instant case. The opinion demonstrates the close relationship between the questions presented in the instant proceeding and the question presented in the thousands of certification proceedings referred to above concerning which facilities, if any, may be certificated.

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[14] For recent examples of the numerous instances where this opinion has been filed, see *Matter of Saturn Oil and Gas Co., Inc.*, Docket G-5999, Commission Order issued November 9, 1956 (not yet reported); *Matter of the Texas Co.*, Docket G-5717, Commission Order issued November 2, 1956 (not yet reported).

C. THERE ARE CONFLICTS IN PRINCIPLE BETWEEN THE DECISION BELOW AND DECISIONS OF THIS COURT, BETWEEN THE DECISION BELOW IN THIS CASE AND ANOTHER DECISION OF THE COURT BELOW, AND BETWEEN THE DECISION BELOW AND AN OPINION FILED IN ANOTHER COURT OF APPEALS.

In the *Phillips* case, this Court *held* that the *price* at which an independent producer and gatherer (there, also, a processor) of natural gas sold that gas in interstate commerce for resale was subject to regulation by the Commission. In holding that the producing and gathering exemption was inapplicable to *rate* regulation of such sales, the Court did not purport to hold that the Commission had jurisdiction over the abandonment of sales. Not only was this question not before this Court, but Section 7(b), which governs abandonment, unlike Section 4 which governs rates, specifically limits the Commission's jurisdiction to abandonment of facilities subject to the Commission's jurisdiction or services rendered by means of such facilities—i.e., facilities subject to the Commission's jurisdiction. This Court specifically quoted with approval in the *Phillips* decision from its only abandonment decision under the Act as follows:

> "In Federal Power Co. v. Panhandle Eastern Pipe Line Co., . . . we observed that the 'natural and clear meaning' of the phrase 'production or gathering of natural gas' is that it encompasses 'the producing properties and gathering facilities of a natural-gas company.'" (347 U.S. at p. 678.)

The *Panhandle* case (337 U.S. 498) specifically held that a transfer of gas leases by an interstate pipeline company, which leases were a vital part of the reserves upon which its interstate transportation and sale of natural gas depended, was not within the Commis-

sion's Section 7(b) jurisdiction over abandonments. This holding was specifically on the ground that such leases were production facilities exempt from Commission jurisdiction by Section 1(b), and, accordingly, there were no facilities subject to the Commission's jurisdiction under Section 7(b).

While the *Phillips* case did not deal with the question of which facilities, if any, were subject to the Commission's jurisdiction, the Court did state that, with respect to Phillips' sales:

> "By the time those sales are consummated, nothing further in the gathering process remains to be done." (347 U.S. at p. 692.)

Using this sentence as the starting point, the Court below in the instant case ruled as follows:

> "The Commission has found that the Huber's T valve system, its valves and the pipe, are facilities which are used to effect the sale of natural gas to Northern . . . The Phillips decision makes such facilities, sales facilities. These are within the Commission's jurisdiction by Section 7(c) of the Act . . . .
>
> "And Section 7(b) of the Act directly prohibits the abandonment of those facilities except by means of the designated procedure which was not followed by Huber." (App. 10a-11a).

This language by the Court below is inconsistent in principle with this Court's *Panhandle* decision, and is a substantial extension of the *Phillips* decision. In the *Panhandle* case, in the words of the dissenting members of this Court, who believed that the Commission there had Section 7(b) jurisdiction:

> "[Panhandle] had its rate base fixed and its ability to serve the public determined on its claim

> of ownership of the very gas reserve properties the Court now permits it to sell to an affiliate over the protest of the Commission. According to the allegations in the Commission's complaint the respondent gas company has already received from its customers large sums of money from rates which reflected expenses incurred in maintaining these reserves and for exploration and development costs in relation to them." (337 U.S. at p. 519, dissenting opinion.)

The majority of the Court, in discussing these matters stated:

> "The argument here is that since natural gas is the 'life blood' of a pipe line system, a company by disposing of its gas reserves, unhampered by Commission control, may render itself unable to continue service; consequently abandonment of facilities and service without the consent of the Commission will result." (337 U.S. 509.)

Rejecting this argument the Court's opinion went on to comment:

> "The argument begs the question. The section like those above, covers only 'facilities subject to the jurisdiction of the Commission'." (337 U.S. 509.)

Thus in the *Panhandle* case facilities were held exempt from jurisdiction under Section 7(b) even though they were essential to the system of transportation and sale, and even though they were used by Panhandle in its rate base for pricing its sales, and were used as a basis for expanding its transportation system. They were held exempt because they were production facilities. So in the instant case, the facilities involved must be considered exempt, even

though used in and indispensable to the sale, if they are "gathering" facilities.

The decision below conflicts directly in principle not only with the *Panhandle* decision, but also with the decision of this Court in *Connecticut Light and Power Co.* v. *F.P.C.*, 324 U.S. 515 (1945). This Court's decision in that case makes clear that the Commission here cannot attach jurisdiction under Section 7(b) because the Huber production and gathering facilities are used in aid of the sale to Northern. In that case the exemption of "local distribution" facilities under Section 201(b) of the Federal Power Act was involved. The Court said:

> "It does not seem important whether out-of-state energy gets into local distribution facilities. They may carry no energy except extra-state energy and still be exempt under the Act. The test is whether they are local distribution facilities . . . The (Commission) order must stand or fall on whether this company owned facilities that were used in transmission of interstate power *and which were not facilities used in local distribution.*" (324 U.S. at 531) (emphasis added.)

So here the Commission's jurisdiction must stand or fall on whether the Huber facilities which the Commission claims are used in aid of the sale are or are not production or gathering facilities. To the attempt to rest Commission jurisdiction on the contention that the valve system into which the Northern facilities connect is a "sales" facility, and that Huber's whole producing and gathering operation, upon which the sale to Northern is dependent, may not be abandoned without Commission permission because of the alleged jurisdiction over the valve system, the *Connecticut Light and Power* case presents a short answer. In

speaking of the "local distribution exemption" there in issue, this Court said:

> "To construe this as meaning that, even if local, facilities come under jurisdiction of the Federal Commission because power from out of state, however trifling, comes into the system, would nullify the exemption and as a practical matter would transfer to Federal jurisdiction the regulation of many local companies that we think Congress intended to leave in state control." (324 U.S. at 531.)

The Court below and the Commission have misapplied the *Phillips* decision in interpreting it to overrule the principles enunciated in the *Panhandle* and *Connecticut Light and Power* cases. An order to sell and deliver the gas is, for all practical purposes, an order to produce and gather it. While it is possible to make a technical distinction between the instant case and the *Panhandle* and *Connecticut Light and Power* cases, if those decisions have any real vitality remaining, the decision below conflicts with them.

The decision below also is inconsistent in principle with an earlier decision of the Court of Appeals for the Third Circuit which antedated the *Phillips* decision. In *Panhandle Eastern Pipe Line Co.* v. *F. P. C.*, 204 F. 2d 675, 680 (C.A. 3, 1953) a Federal Power Commission order, much more remote from production and gathering than the order involved here, was reversed by the Court in part because deemed to constitute a regulation of production and gathering. See also the opinion of Judge Brown, dissenting in *Magnolia Petroleum Co.* v. *F.P.C.*, 236 F. 2d 785, 806 (C.A. 5, 1956).

D. THE DECISION BELOW IS ERRONEOUS.

1. The Commission Has No Statutory Authority to Prevent Termination of the Sale by Huber to Northern Because Section 7(b) of the Act Limits Its Authority Over Abandonment to Facilities or Services Rendered by Means of Facilities Within the Commission's Jurisdiction and Huber's Facilities All Are Production or Gathering Facilities Exempt From Commission Jurisdiction by Section 1(b) of the Act.

Huber does not dispute the factual conclusion of the Commission and the Court below that out of its extensive producing and gathering equipment 3 valves and 2 feet of pipe are used in and necessary to the sale. Huber would go further and contend that all of its equipment from the wells to the point of connection with the Northern facilities is useful and necessary to the sale. The Commission recently has recognized this point. Holding that it makes no difference whether a facility also serves a producing, gathering, or some other function, the Commission has labeled as "sales" facilities those facilities which are most useful to and most immediately effect the sale. *Matter of Continental Oil Co.*, Opinion No. 293, issued September 20, 1956 (not yet reported). As this Court pointed out in the *Panhandle* case, *supra*, however, this begs the question of whether the Commission has jurisdiction under Section 7(b). This question of jurisdiction turns on whether all these facilities also are producing and gathering facilities excluded from Commission jurisdiction by Section 1(b) of the Act.

Both the Court below and the Commission rested their decisions on the *Phillips* decision. A careful reading of the *Phillips* decision nowhere discloses any intimation that the use of a part of a producing or gathering system to facilitate a sale in interstate com-

merce subjects the facilities and service to Commission jurisdiction over abandonment under Section 7 (b).

The Commission's abandonment jurisdiction under Section 7(b) is not as broad in scope as its rate jurisdiction under Section 4. The language conferring jurisdiction in Section 7(b) contains limitations not present in Section 4. Before Commission jurisdiction over abandonment of a particular service may attach, it must first be found that the service is rendered by "facilities subject to the jurisdiction of the Commission."

Applying Sections 1(b) and 7(b) to the undisputed facts in this case, it is clear that there are no jurisdictional facilities and that the Commission does not have jurisdiction over the abandonment in issue. The undisputed evidence is that all the Huber facilities are known in the industry under a "functional" or "engineering" classification, as production or gathering facilities. (R. 62a, 69a, 115a, 116a). The conclusion reached below, that as a matter of law they are "sales" facilities (App. 11a), emasculates the limitations which Congress, by Sections 1(b) and 7(b), has placed upon the Commission's jurisdiction.

There can be no doubt that the decision of the Court below and of the Commission results in classification of some facilities of every producer or gatherer who sells gas in interstate commerce for resale as "sales" facilities subject to the Commission's jurisdiction. See also *Matter of Continental Oil Co.*, Opinion No. 293, *supra*. To assume that, wherever there is a sale, the seller has "sales" facilities, thus making abandonment of the deliveries made on such facilities subject to the Commission's jurisdiction under Section 7(b), not only

is to ignore the producing and gathering exemption of Section 1(b), but is to strip the facilities requirement of Section 7(b) of any real meaning. The net result is that the producing and gathering exemption is inapplicable in almost every instance where the Commission otherwise would have jurisdiction, and in essence this exemption is deleted from the Act. Similarly, the assumption that there always are jurisdictional facilities where there are sales, renders the facilities requirement a nullity.

It may be contended that the reference to facilities subject to the jurisdiction of the Commission in Section 7(b) is controlled and clarified by the requirement in Section 7(c) of a certificate of public convenience and necessity for the construction and operation of facilities used in the "transportation or sale of natural gas subject to the jurisdiction of the Commission." This argument also begs the question of the application of the "producing or gathering" exemption in Section 1(b).

To indulge the inference that the language of Section 7(c) referred to makes all facilities used or useful in connection with sales of natural gas in interstate commerce subject to the jurisdiction of the Commission under Section 7(b) without reference to the exemption in Section 1(b) would ignore the history of the legislative action. As the Court below pointed out in its opinion:

> "The jurisdictional sections of the act, 1(b) and 7(b) obviously do not rely upon the certificate provisions of 7(c). The pertinent amendments to the latter did not come into existence until almost four years after Section 1(b) and 7(b) had been enacted". (App. 14a).

The Commission also concluded that the scope of Section 7(b) is not affected by Sections 7(c) and 7(e). (R. 21a-22a). At the time this amendment was added the Commission had ruled that sales such as are here involved were exempt from all Commission regulation due to the producing and gathering exemption.[15] Further, there is no suggestion in the legislative history of the 1942 amendment that the change was being sought or was intended to expand the jurisdiction of the Commission over producing or gathering facilities.

Under these circumstances, all that can be drawn from Section 7(c) is that the Commission shall require a natural gas company to make application for a certificate of convenience and necessity covering the transportation or sale of gas in interstate commerce and also covering whatever facilities "therefor" properly are subject to the jurisdiction of the Commission in the light of the grant of jurisdiction and the exemptions therefrom contained in Section 1(b). It does not determine that all facilities used or useful in connection with the sale are so subject to the jurisdiction of the Commission without reference to the producing and gathering exemption in Section 1(b).

The same rule which holds true at the beginning of interstate transmission also must hold true at the end, and presumably the facilities of a local distributing company which attached to a pipeline company's facilities, under the decision below now would be known as "sales" facilities, for they equally facilitate

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[15] *Matter of Columbian Fuel Corp.*, 2 F.P.C 200 (1940); *Matter of Billings Gas Co.*, 2 F.P.C. 288 (1940).

the sale at that end.[16] Thus the Commission would extend its regulation to local distribution, which Section 1(b) also exempts.

The Act may be interpreted with consistency, and without ignoring either the plain language or history of Sections 1(b), 7(b) and 7(c), by recognizing that the reference to "facilities" both in Section 7(b) and Section 7(c) was not intended to encompass facilities which essentially were part of the producing and gathering or local distribution systems, even though those facilities might also be useful or essential to the execution of a sale. As noted above, in *Connecticut Light and Power Co.* v. *F. P. C., supra,* this Court rejected a Commission attempt to assert jurisdiction under the Federal Power Act, where the circumstances and Commission reasoning were closely analogous to the situation here before the Court.

An examination of the cases prior to both the *Panhandle* and the *Phillips* decisions, where there was occasion to construe the "production or gathering" exemption, serves only to underline the foregoing analysis. See *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591, 612-13 (1944); *Colorado Interstate Gas Co.* v. *Federal Power Commission,* 324 U.S. 581, 602-03 (1945); *Interstate Natural Gas Co.* v. *Federal Power Commission,* 331 U.S. 682, 690 (1947). In each of these cases the "production and gathering" exemption was considered in relation to rate making or

[16] In *Federal Power Commission* v. *Panhandle Eastern Pipeline Co.*, 337 U.S. 498, 504-05 (1949) this Court specifically rejected a Commission argument that the producing and gathering exemption of Section 1(b) was narrower than the local distribution exemption in terms of the application of those exemptions to "facilities" therefor.

price fixing. This Court drew the distinction in each instance between rate regulation which was delegated to the Commission, and regulation of the full activity of producing or gathering natural gas over which the Commission was given no authority.

2. The Act Requires That Huber Terminate Its Sale to Northern Because Section 7(c) Makes Such a Sale Unlawful Unless Certificated by the Commission, and the Commission is Precluded by the Requirements of Sections 7(c) and 7(e) From Issuing a Certificate of Convenience and Necessity to Huber.

The terms of Section 7(c) make the following points clear:

a. No sale of natural gas within the Commission's jurisdiction may be made unless the Commission first issues a certificate of convenience and necessity.[17]

b. A certificate must be issued without further proof of public convenience and necessity with respect to sales and services in existence on February 7, 1942, "if application for such certificate is made to the Commission within ninety days after February 7, 1942."

c. "In all other instances . . . the application shall be decided in accordance with the procedure provided in subsection (e) [Section 7(e)] . . . and such certificate shall be issued or denied accordingly. . . . "

Section 7(e) is equally explicit. It provides the following:

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[17] See also *House Report No. 1290*, 77th Cong., 1st Session, p. 2 (1941); *Senate Report No. 948*, 77th Cong., 2nd Session, p. 1 (1942); *Matter of Panhandle Eastern Pipeline Co.*, Opinion No. 274 (1954) (not yet reported); *Matter of Mississippi River Fuel Corp.*, 9 F.P.C. 198, 204 (1950); *Cf. U. S.* v. *Rockplant Motor Transit Co.*, 340 U.S. 419 (1951).

a. It is applicable except "in the cases governed by the provisions in subsection (c) [Section 7(c)] . . .".

b. A certificate may be issued to any qualified applicant only if the Commission finds that the applicant is willing and able to provide the service and conform to the applicable law and regulations and that the present or future public convenience and necessity requires the sale or service.

There is no dispute that Huber was rendering the service and making the sale here in issue on February 7, 1942, and further that Huber did not apply for a certificate of convenience and necessity until September 24, 1954 (and applied even then only under protest) (R. 7a, 32a-35a), long after the ninety days referred to in Section 7(c) had expired. Further, it is undisputed that Huber has asserted that it is unwilling to render the service or to comply with the applicable laws and regulations, that its application for a certificate was filed under protest, and that Huber sought to withdraw that application. (R. 7a-8a, 15a, 43a-46a)

The Commission has not found Huber to be "willing" to perform the service, nor has the Commission found the service to be required by the public convenience or necessity, although it has found that public convenience and necessity do not permit the abandonment of the sale (R. 27a). Neither the Commission nor the Court below takes issue with Huber's contention that such findings are prerequisite to issuance of a certificate under Section 7(e) and cannot be made in this case. Instead, the Commission and the Court below rely on Section 7(c) as the basis for issuance of a certificate without the necessity of such findings, holding Section 7(e) inapplicable. (App. 12a-14a; R. 16a).

The rationale of these decisions is based upon the fact that the Commission did not assert its jurisdiction over such sales until after the *Phillips* decision on June 7, 1954. Accordingly, the Commission and the Court below reasoned that the ninety day proviso of Section 7(c) somehow is extended until some unspecified time, and with respect to services in existence on February 7, 1942, which are within the ambit of the *Phillips* case, a certificate may issue under Section 7(c).

This conclusion amounts to amendment of Section 7(c), deleting the ninety day requirement and substituting a proviso to the effect that, wherever the Commission misinterpreted the Act, the time for issuance of a certificate, without making any of the requisite findings, shall be extended for some indefinite period after a decision of this Court corrects the matter. This is contrary to the Commission's own regulations which provide, without qualification, for a cut-off date under Section 7(c) of May 8, 1942. See 18 C.F.R. Section 157.1. The few pertinent authorities found also suggest the opposite result. See *In the Matter of Southern Natural Gas Co.*, 3 FPC 436, 439 (1943); *Grove* v. *U. S.*, 40 F. Supp. 503, 504-05 (D. Pa., 1941).

If, as Huber contends, the Commission may not, under the facts of this case issue a certificate of convenience and necessity, then a continuation of its sale to Northern is made unlawful by Section 7(c). While Sections 7(c) and 7(e), insofar as here pertinent, were added after Section 1(b) and 7(b) had been enacted, and are not decisive as to the intended meaning of

Sections 1(b) and 7(b),[18] certainly when possible the Act should be interpreted to be consistent. That consistency is found, without ignoring some language, and amending other terms of the Act, only if Huber's proposed abandonment is found to be beyond the Commission's jurisdiction.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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[18] In a very recent decision the Court of Appeals for the 10th Circuit held the converse, that Section 7(b) did not limit the Commission's power under Sections 7(c) and 7(e). The issues there, however, pertained solely to whether a willing applicant could obtain a certificate of limited duration. *Sunray Mid-Continent Oil Co.* v. *F. P. C.*, (C.A. 10, October 29, 1956) (not yet reported).